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No. 10-1027

Supreme Court, U.S.
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In The

Supreme Court of the United States

MISSOURI TITLES LOANS, INC.,

Petitioner,

v.

BEVERLY BREWER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Missouri Supreme Court's method of interpreting and applying the general Missouri state law contract defenses regarding unconscionability and exculpatory provisions is subject to review by this Court.

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ARGUMENT:
Reasons for Denying the Petition

In *Brewer v. Missouri Title Loans,* 323 S.W.2d 18, 20 (Mo. 2010), the Missouri Supreme Court held that a title lender who loaned money at rates exceeding 200% and who was alleged to have engaged in various forms of consumer fraud against thousands of consumers could not enforce a clause that functioned to immunize it from all claims by stripping its customers of all rights and remedies. The Missouri Supreme Court concluded that under general Missouri contract law 1) the clause was unconscionable and 2) the clause failed as an exculpatory clause because it was impermissibly ambiguous. In reaching its decision, the Missouri Supreme Court recognized and followed the Federal Arbitration Act ("FAA"), this Court's holding in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, ___ U.S. ___, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010), and Missouri common law regarding unconscionability and exculpatory clauses. The Court rooted its decision in the extensive factual record Respondent presented to the trial court.

Petitioner responded by filing its Petition for Writ of Certiorari. In summary, Petitioner's argument is that the Missouri Supreme Court created a special test for the enforceability of arbitration clauses that is preempted by the FAA. This is an unabashed indictment of the competence and credibility of the Missouri Supreme Court, as the Missouri Supreme Court specifically noted that it was applying general

contract law, that it recognized the preemptive boundaries of the FAA, and it cited to this Court's decision with precision and deference. Further, Petitioner has urged this Court to engage in fact finding and weighing of evidence regarding things such as whether to believe Respondent's expert witnesses, and the extent to which consumers can find representation for small damage claims in Missouri.

As such, Petitioner's request for review amounts to a request that this Court take on the entirely new role of deciding whether a state supreme court got state law right and that this Court sits as a second trial court. Any reversal of the decision in this case would require a conclusion that the Missouri Supreme Court, when it expressly stated it was following general Missouri state contract law and treating factual findings of the trial court level with deference, was either disingenuous or entirely incompetent.

Specifically, Petitioner argues that by its decision in *Brewer v. Missouri Title Loans*, the Missouri Supreme Court:

- Has shown that it is not competent to apply Missouri state law regarding the general contract defense of unconscionability (Petition, p. 14-20);
- Does not understand how to apply Missouri state court *evidence* with regard to unconscionability (Petition, pp. 26-30);
- Has shown "contempt" for arbitration (Petition, p. 31);

- Refuses to treat arbitration clauses "fairly" (Petition, p. 31); and
- Has intentionally ignored the FAA in order to advance "consumer-friendly public policy" (Petition, p. 20).

Petitioner's request for this Court to sit in judgment of state law, essentially as a second Missouri Supreme Court, should be seen for what it is: a request to reverse *Erie* and have this Court sit as the final word on state law in every state. This has never been work of this Court, however, and according to this Court's precedent and the United States Constitution, it cannot become the work of this Court. To the contrary, the highest court of a state should "utter the last word" regarding the law of a state, and is the best authority for discerning and applying the laws of that state. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 79 (1938). *Erie's* mandate was that federal courts lack the authority to create "federal general common law." 304 U.S. at 78. This mandate has a constitutional basis rooted in the limited jurisdiction of federal courts. *Id.* at 77-78. As this Court stated in *Erie*:

> And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in

> the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78. Petitioner seems to think that federal courts should dictate state law to state supreme courts. It's the other way around, of course: federal courts are constitutionally required to look to the rulings of state supreme courts to determine state law. Petitioner's reliance on federal arbitration cases, including the Eighth Circuit cases of *Cicle v. Chase Bank, USA,* 583 F.3d 549 (8th Cir. 2009) and *Pleasants v. American Express Co.,* 541 F.3d 853 (8th Cir. 2008), is absolutely inappropriate. Petitioner's Brief, pp. 21-23. In truth, the Eighth Circuit is constitutionally obliged to look to *Brewer* for the proper way to apply the state law contract defenses of unconscionability and exculpatory clauses.

Section 2 of the FAA provides as follows:

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C.A. § 2. (Emphasis added). Any reasonable reading of the *Brewer* opinion will reveal that the Missouri Supreme Court was applying state law contract defenses to invalidate the Missouri Title Loans arbitration contract. The Missouri Supreme Court recognized the importance of applying only generally applicable state contract defenses at the outset of its opinion:

> [G]enerally applicable state law contract defenses such as fraud, duress and unconscionability may be used to invalidate all or part of an arbitration agreement without contravening the FAA.

323 S.W.2d 18, 20 (Mo. 2010).

The Missouri Supreme Court then proceeded to apply state law. The Court held that enforcing Petitioner's contract clause as written would mean that "none of [Petitioner's] customers would have a practical remedy to bring about a stop to the conduct. . . ." that was alleged to be illegal. The Court concluded that this stripping of rights by Petitioner and consequent immunization of Petitioner was unconscionable. *Id.* at 23-24. The Court also held that exculpatory clauses in Missouri are only enforceable if they are clear and unambiguous, and that Petitioner's clause had the "net result" of exculpating Petitioner, but failed to state this unambiguously. *Id.* at 24. These are not holdings limited to arbitration clauses.

The reasonable reading of *Brewer* is that it sets out general principles limiting that party's ability to

grant itself total immunity. Under *Brewer*, a defendant cannot include a class action waiver in any contract (whether or not it contained a duty to arbitrate) if it immunizes the defendant by stripping individuals of all remedies. The holding of *Brewer* appears to make it unconscionable to place a limitation on damages that would keep people from pursuing claims by making it economically irrational to do so. Such provisions could and sometimes do arise in the absence of an arbitration clause, yet they would all be unconscionable pursuant to *Brewer*.

Contrary to the Petition, this case is not about arbitration. The real issue is whether a party can immunize itself from suits based on Missouri consumer protection laws by inserting a class waiver into its contract, especially where that class waiver invites systematic and egregious violations of the law that causes financial damages to consumers. Petition ignores the central focus of this case and, instead, suggests that since many of the recent rulings regarding unconscionability have arisen in the context of arbitration, they must be unfairly targeting arbitration. This logical fallacy leaps off the page. Just because some decisions arose in the context of arbitration clauses does not mean the decisions are limited to arbitration clauses or hostile to them.

As such, Petitioner's request for review is rendered unnecessary by a careful reading of the majority opinion in *Brewer*. A careful reading reveals that Petitioner's summary of the decision has been heavily spun into a warped cartoon of the actual decision in

an effort to make it easier to challenge. In reality, the decision was carefully reasoned to be fully respectful of both federal and state law.

Respondent further requests that this Court deny the petition for writ of certiorari for these additional compelling reasons:

1. The Missouri Supreme Court *Brewer* decision "does not seriously erode federal policy" pursuant to 28 USC § 1257 and *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975). As indicated at the outset, *Brewer* involves the application of Missouri state contract law. As corroboration, large swathes of the Petition are dedicated to criticism of the manner in which the Missouri Supreme Court applied state contract law defenses. (Petition, pp. 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 27, 28, 29, 30 and 31).

2. The Missouri Supreme Court clearly indicated that the class waiver that was the focus of *Brewer* was unenforceable *for two independent reasons*. Petitioner barely mentions the second independent state law ground for striking that class waiver: that the clause was an improper exculpatory clause because it was ambiguous. The existence of this second well-established and independent basis for the failure of Petitioner's arbitration clause is reason, in and of itself, for denying the Petition for Writ.

3. Petitioner states that a pending decision of this court, *AT&T Mobility LLC v. Concepcion*,

No. 09-983, raises substantially similar questions to the questions raised in the petition for writ. To the extent that Petitioner's suggestion is accurate, its argument constitutes yet another compelling reason for denying the Petition; to the extent the Petition is correct, these issues will have already had the recent and proper attention of this Court.

4. Petitioner has failed to attach any copy of the title loan arbitration agreement (neither the text of the agreement nor a copy of the agreement in its tiny native font) anywhere within the 184-page package that Petitioner has submitted to this Court.

Respondent asks this Court to deny the Petition for each of the above-stated reasons. Petitioner has raised an issue of state law, not federal law question. Therefore, *Brewer* is not in conflict with governing Supreme Court precedent, and Petitioner has not presented any issue of federal law with significant practical consequences.

Trial Court Proceedings in *Brewer v. Missouri Title Loans*

Petitioner required each of its customers to hand over the original titles to their cars and sets of their car keys in order to receive a loan. App. 96a-98a.[1]

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[1] All references to the Appendix ("App.") are to the Petitioner's Appendix.

Respondent-Plaintiff Beverly Brewer alleges that she took out a $2,215 loan from Defendant. App. 96a.[2] Her loan accrued interest at a rate of 300%. App. 97a. Over the next two months, she paid Petitioner two separate payments totaling about $1,147.00. These two payments reduced her loan principal by six cents ($.06). App. 96a.

Ms. Brewer filed this class action against Petitioner-Defendant Missouri Title Loans, alleging that it systematically violated numerous Missouri statutory provisions specifically pertaining to title loans. Those statutory provisions are listed in an attachment to the Amended Petition. App. 130a. Respondent further alleged that Petitioner:

- Failed to make state-mandated disclosures on the loan agreement;
- Failed to tell customers that frequent renewals of loans would result in interest and fees that far exceeded the actual value of the loans;
- Charged excess interest and fees; and
- Failing to evaluate the customers' ability to pay before loaning money.

App. 99a-100a.

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[2] The Respondents' *First Amended Petition* included three plaintiffs, Beverly Brewer, Althea Peete, and Anthony Pipkens. The case proceeded to resolution in the trial court with only one of the plaintiffs, Beverly Brewer.

Respondent alleged that Petitioner violated these Missouri loan laws with regard to tens of thousands of other Missouri citizens. In her Class Action Petition, Respondent asked Petitioner to compensate its Missouri customers for all damages caused by Petitioner's violations of Missouri laws. App. 102a-103a.

Respondent further alleged that Petitioner's contract was unconscionable. App. 107a. She alleged that Petitioner's arbitration provision contained a class waiver that barred Respondent from filing any sort of class claims, both class actions and class arbitrations. App. 106a-107a. Respondent alleged that Petitioner's arbitration clause "requires the Plaintiffs to pay $125 filing fee regardless of the value of the claim, but prohibits class arbitration or class actions." App. 108a. The trial court found that Petitioner's arbitration clause required that the parties bore all arbitration costs and expenses, "including fees for attorneys, experts and witnesses." App. 46a. The Petitioner attempted to retract this language "in an eleventh hour change" at the trial court, but the trial court ruled that, pursuant to settled Missouri law, Petitioner's arbitration clause should be evaluated as it existed at the time of the transaction. App. 47a.

Based on its evidentiary hearing, the trial court ruled that the arbitration clause of Petitioner was unconscionable and therefore unenforceable as written because it immunized Petitioner from the claims

of its customers.[3] App. 42a. The trial court also ruled that Petitioner's arbitration clause was "unenforceable for an entirely separate ground: it functions as an exculpatory provision," violating long-standing Missouri law that such provisions must be "clearly worded and unambiguous." App. 47a. The trial court severed the part of the arbitration clause that it had found to be unconscionable (the class waiver) from what it otherwise considered to be (pre *Stolt-Nielsen*) an enforceable contract. The trial court sent the case to class arbitration, "because the arbitration clause at issue contains a severability clause. . . ." App. 47a.

Missouri Appellate Court Proceedings in *Brewer v. Missouri Title Loans*

The decision by the trial Court was affirmed by the Missouri Court of Appeals (App. 24a) and eventually reached the Missouri Supreme Court (App. 1a). *Brewer v. Missouri Title Loans*, 323 S.W.2d 18, 20 (Mo. 2010). The Supreme Court of Missouri invalidated the class arbitration waiver on the same two independent grounds applied by the trial court: Petitioner's arbitration clause was unconscionable *and* it constituted an impermissible exculpatory clause.

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[3] The trial court decision occurred before the *Stolt-Nielsen* opinion was handed down.

In coming to its decision, the Missouri Supreme Court carefully considered the then-recent United States Supreme Court case of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, ___ U.S. ___, 130 S. Ct. 1758 (2010). The Court interpreted *Stolt-Nielsen* as holding that parties cannot be compelled to submit a dispute to class arbitration either when the arbitration agreement is silent as to class arbitration or when it specifically prohibits class arbitration. 323 S.W.3d at 21. The *Brewer* court concluded that *Stolt-Nielsen* "requires an affirmative consent to class arbitration before it may be compelled. . . ." 323 S.W.3d at 20-21.

According to the *Brewer* Court, the holding of *Stolt-Nielsen*, 130 S. Ct. 1758, did not require individual arbitration – certainly not in a case where the class waiver was unconscionable. *Id.* at 21. The Court held that simply invalidating the class waiver and sending the case to individual arbitration would not remedy the unconscionable aspects of the arbitration contract. *Id.* Even if the unconscionable class waiver were invalidated and severed from the arbitration contract, Respondent would be required to submit to *individual* arbitration. The Court held that individual arbitration is not a proper remedy when individual arbitration is not "economically practical or feasible because the amount in controversy is so small in relationship to the risks and costs involved that a reasonable attorney would not take the case. . . ." *Id.* The Court concluded that this difficulty could be avoided "only by permitting litigation of this matter as part of a class action, and as there is no affirmative

agreement to class arbitration, the class action must proceed in court." *Id.* The Court cautioned that this remedy of striking the entire arbitration clause and sending the case to court for class action is not appropriate in every case:

> It is only when the practical effect of forcing a case to individual arbitration is to deny the injured party a remedy – because a reasonable attorney would not take the suit if it could not be brought on a class basis either in court or through class arbitration that – a requirement for individual arbitration is unconscionable.

Id. The Court then examined the title lender's arbitration clause, holding that even though there are often procedural and substantive aspects to unconscionability, it is not necessary to find both procedural and substantive unconscionability to invalidate a contract clause. "Under Missouri law, unconscionability can be procedural, substantive or a combination of both." *Id.*

The Supreme Court of Missouri upheld the trial court's determination that the arbitration waiver was unconscionable. *Id.* at 23. With regard to procedural unconscionability, the Court found that the loan agreement was nonnegotiable and difficult for the average consumer to understand. *Id.* The trial court had also found that the title lender was in a superior bargaining position relative to the customer. *Id.* The Court also concurred with the trial court's finding that there was substantial evidence of substantive

unconscionability in this case, based on expert testimony from three consumer lawyers who testified in the trial court (consumer attorneys Bernard Brown, Dale Irwin, and John Ammann, a professor at St. Louis University School of Law):

> Brewer also introduced substantial evidence of substantive unconscionability. Brewer presented expert testimony from three consumer lawyers who testified it was unlikely that a consumer could retain counsel to pursue individual claims. John Ammann, a professor from St. Louis University School of Law, testified that it would be very hard, "if not impossible," for a consumer to find counsel to handle a claim under the loan agreement because it is a complicated area of law. Such a claim would require significant expertise and discovery; therefore, it would not be financially viable for an attorney because of the complicated nature of the case and the small damages at issue. Bernard Brown, another expert testifying on behalf of Brewer, testified it would be "exceedingly difficult," if not "outright rare," to find representation for individual claims. The final expert, Dale Irwin, testified that the likelihood of an individual finding an attorney to represent him or her was "virtually nil" because of the small damages and the likelihood of a "heavily defended" Petitioner such as Missouri Title Loans.

Id. The damages sought by the plaintiff stemmed from a title loan in the amount of $2,215. *Id.* at 20. The Court held that the plaintiff's inability to retain

counsel (were the plaintiff forced to try the case individually, not as a class proceeding) "leaves the consumer with no meaningful avenue of redressing complicated statutory and common law claims." *Id.* at 23. The Court stated:

> [T]he net result of the class arbitration waiver in this case is that *Brewer* effectively forfeited legal counsel in any claim that arose under the loan agreement. To hold otherwise would allow lenders to continue unfair lending practices "since none of its customers would have a practical remedy to bring about a stop to the conduct." [citations omitted] Furthermore, because *Brewer* proved that the class arbitration waiver was unconscionable, the unavailability of class arbitration under the FAA means that the entire arbitration agreement is rendered unconscionable. Given that class arbitration is not an option in this case, the only way to remedy the unconscionability in this case is to strike the entire arbitration agreement.

Id. at 23.

The *Brewer* Court agreed with the holding in *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, (Mo. App. E.D. 2008), that substantive unconscionability exists when the plaintiff "effectively forfeited legal counsel in any claim that arose under the loan agreement. To hold otherwise would allow lenders to continue unfair lending practices 'since none of its customers would have a practical remedy to bring about a stop to the conduct.'" *Id.* at 23.

Because class arbitration would not be available under the FAA, the Court deemed that the entire arbitration agreement was rendered unconscionable. Therefore, the Court modified the trial court ruling (which had been entered prior to the decision in *Stolt-Nielsen*) by striking the entire arbitration agreement. Petitioner's arbitration provisions contained a severability clause. . . ." App. 47a.

The *Brewer* Court also ruled that the defendant's class waiver failed as an exculpatory clause because it was not clear and unambiguous, as required by long-standing Missouri common law pertaining to contracts. *Id.* at 24. "A defendant cannot exculpate itself from liability unless the language is clear and unambiguous." *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 334 (Mo. banc 1996). In order for the exculpatory clause to be enforceable, it was not enough that the consumer knew she was giving up the right to a class proceeding. To be enforceable, it must also be clear that "the consumer realizes that he or she effectively is bypassing the opportunity to retain counsel to litigate a claim against the lender." *Brewer, supra,* at 24. In this case, the Court held that nothing in the class waiver "unambiguously informs the consumer that the net result of the waiver is that the lender effectively is immunized from liability." *Id.* As this Court can clearly see from the relevant section of *Brewer,* the problem with Petitioner's exculpatory clause had absolutely nothing to do with whether the case was tried in court or in arbitration. It was absolutely neutral as to arbitration.

Responses to Specific Arguments of Petitioner

Petitioner claims that the Missouri Supreme Court has utilized a "special test" for unconscionability. Petition, p. 7. Petitioner is mistaken. As stated by the *Brewer* dissent, an unconscionable contract is an agreement "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Smith v. Kriska,* 113 S.W.3d 293, 298 (Mo. App. 2003). Section 400.2-302(1), RSMo, gives further guidance as to Missouri's method of determining unconscionability:

> If the court as a matter of law finds that the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Compare this passage to the majority holding in *Brewer,* in which the court recognized "There are procedural and substantive *aspects* to unconscionability." *Brewer*, 323 S.W.3d at 22 (emphasis added). The *Brewer* decision did not announce any new special test for arbitration. The *Brewer* court stated that the substantive/procedural distinction presents merely "an acceptable analytical *framework* for most cases because a party who employs procedurally unconscionable bargaining tactics usually

does so with the goal of inducing the other party into a one-sided contract." *Id.* (emphasis added).

By these passages, the Missouri Supreme Court is recounting the obvious, that there are procedural and substantive "aspects" to unconscionability; there are aspects of unfairness that have to do with contract formation and others that have to do with the harshness of the contract terms. Together they form an evidentiary "framework" to which courts then determine whether unconscionability exists. The "framework" is not the test. There is no suggestion in *Brewer* that the unconscionability test that a Missouri court must ultimately apply to the evidence it has gathered is any different than the general test cited by the dissent. The dissent does not point to any different test used by the majority and, in fact, can't do so. *See* App. 13a, footnote 1 (where the dissent states "It is not clear what definition of 'unconscionability' the majority is using."). The actual test for unconscionability of any contract in Missouri, though not articulated by the *Brewer* majority, is clearly set forth in *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107-08 (Mo. App. E.D. 2003), a case cited with approval by the *Brewer* majority. *Swain* states the test in a passage that makes it clear that the existence of a mandatory arbitration provision does not bear on unconscionability:

> As to the agreement to arbitrate generally, however, we find that an average person would reasonably expect that disputes arising out of an agreement like this might have

> to be resolved in arbitration. An agreement choosing arbitration over litigation, even between parties of unequal bargaining power, is not unconscionably unfair. It is not an agreement "such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept on the other. . . ." *Hume v. United States,* 132 U.S. 406, 415, 10 S.Ct. 134, 33 L.Ed. 393 (1889) (defining unconscionable contract). Nor does requiring arbitration present "an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it" or constitute an unduly harsh term of the contract. [citations omitted].

Swain v. Auto Services, Inc., 128 S.W.3d 103, 107-08 (Mo. App. E.D. 2003).

The *Brewer* majority recognized that "there are cases in which a contract provision is sufficiently unfair to warrant a finding of unconscionability on substantive grounds alone." *Id.* at 22. The Court further noted that various decisions of the Missouri court of appeals "have held that there must be both procedural and substantive unconscionability before a contract or a clause can be voided," but indicated that this approach is not accurate. *Id.* The Court then offered the comment that this procedural/substantive framework provides "an acceptable analytical framework for most cases" because these two aspects of unconscionability are often found together, where a

party unfairly induces the other party to enter a one-sided contract. The Court also made clear, however, that under Missouri law, "unconscionability can be procedural, substantive or a combination of both." *Id.*

At page 31 of its Petition, Petitioner argues that *Brewer* made a finding of unconscionability "solely" on the basis of substantive unconscionability. Petitioner has catastrophically misconstrued the facts of this case. The Missouri Supreme Court majority opinion in *Brewer* plainly held that there was ample evidence of procedural unconscionability in this case:

> With respect to procedural unconscionability, there was evidence that the loan agreement was non-negotiable and difficult for the average consumer to understand and that Missouri Title Loans was in a superior bargaining position. As Brewer notes, this evidence is virtually identical to *Woods*, 280 S.W.3d at 96, in which the court of appeals affirmed a judgment finding that a class arbitration waiver provision contained in payday lender's loan contract was unconscionable. As in the present case, the evidence in *Woods* demonstrated that the lender was in a superior bargaining position because the high-interest loan agreement was offered to people in financial distress on a take-it or leave-it basis. As in *Woods*, there is sufficient evidence in this case to support the trial court's finding of procedural unconscionability.

323 S.W.3d at 23. The dissent of Judge Breckenridge also recognized that the *Brewer* majority recognized the existence of procedural unconscionability. App. 23a. Therefore, Petitioner's arguments based upon its assertion that *Brewer* supposedly lacked procedural unconscionability should be ignored.

Contrary to Petitioner's arguments, the Missouri Supreme Court's construction of *Stolt-Nielsen* does not turn that case "on its head." Petition, p. 5. To turn *Stolt-Nielsen* on its head would be to force parties who have not expressly agreed to class arbitration to class arbitrate a dispute. That's not what happened in this case. As can be seen in the majority opinion, the Missouri Supreme Court went to great pains to abide by the holding of *Stolt-Nielsen*. And no part of the FAA and no holding by this Court (certainly not *Stolt-Nielsen*) have ever encouraged any state court to deny a party the opportunity to raise or prove any general state law contract defenses. To do that would violate Section 2 of the FAA, yet it appears to be Petitioner's interpretation of *Stolt-Nielsen* that the Missouri Supreme Court was under a federal duty to deny the Respondent the right to have the court consider her two independent general contract law defenses.

What does Petitioner propose in this situation? What should a court do where a class waiver is unenforceable pursuant to general state contract law and yet, according to *Stolt-Nielsen*, an arbitration of the case would necessarily be limited to resolving a single small-damages case? Petitioner's "solution" seems to be this: Send the individual small-damages case to

arbitration and ignore thousands of substantially similar claims brought by other victims, even where these other violations were the result of systemic violations by a predatory lender. Petitioner's "solution" is that thousands of similarly-situated claimants will be prevented from resolving their claims, either in court or in arbitration, despite the substantial evidence (presented by three expert attorneys in this case) that they will remain ignorant of their claims. Moreover, even if those victims do somehow determine that complex predatory lending laws of Missouri have been violated, they will have no meaningful way to obtain legal representation. In short, Petitioner's "solution" to the problem faced by the Missouri Supreme Court is that the legal system is powerless to stop systematic illegal activity by predatory lenders or to formulate any sort of remedy that would compensate thousands of similarly-situated victims.

The sad irony, of course, is that Petitioner's "solution" would not only prohibit any sort of class proceedings. In the real world, it would also prohibit any individual claims. The undisputed evidence in this predatory lending case proves that claimants will have an extraordinarily difficult time finding attorneys. It is regrettable but undeniable that there is no meaningful incentive for attorneys to take these sorts of cases. As indicated above, three consumer attorneys produced by Mrs. Brewer testified that it would be extraordinarily difficult for any of these consumers

to find attorneys to represent them in these small value cases. App. 8a.

Petitioner had ample opportunity to bring forth attorneys to state that they *would* be willing to handle these types of cases individually or even that they knew of other attorneys who would handle these types of cases individually. Petitioner failed to produce even a single attorney to testify in this manner, despite the fact that there are many thousands of licensed attorneys practicing in the state of Missouri. Petitioner would rather, at this late date, wave its hands and argue that it could have produced such testimony. Instead of providing real evidence, Petitioner questions the undisputed record. Petitioner has also chosen to criticize one of the three career consumer attorney experts called by Respondent, Dale Irwin, criticizing Mr. Irwin that he had the audacity to represent *four* consumers in individual low damage cases during his illustrious career. Apparently, Petitioner is arguing that because Mr. Irwin represented four individuals in small damage cases, tens of thousands of victims of Missouri title loan will be easily available to find attorneys to represent them individually in arbitrations.

Petitioner argues that consumers supposedly *have* the ability to obtain meaningful representation despite the fact, established through testimony before the *Brewer* trial court, that there is only a relative smattering of private practitioners engaged in the practice of consumer law throughout the state. This testimony was unanimous and detailed, as suggested

in the majority opinion of the Missouri Supreme Court. 323 S.W.3d at 23. Petitioner's assurance that attorneys will handle these small-damages cases because attorney's fees are allowed by the Merchandising Practices Act is made up out of thin air. As indicated, three career consumer attorneys who practice in Missouri testified to the contrary before the Missouri trial court, and their testimony was carefully considered by the Missouri Supreme Court. These experts indicated that, based upon their own experience, trial judges are rarely willing to award attorney's fees in excess of the value of damages recovered by the plaintiff.

Petitioner has made these wild arguments that financially stressed consumers can find attorneys despite the existence of the lopsided contract at stake in this case. Petitioner's contract required both parties to be responsible for bearing arbitration costs and expenses, "including fees for attorneys, experts, and witnesses." App. 46a. Respondent alleged that Petitioner's arbitration clause required the Plaintiffs to pay $125 filing fee regardless of the value of the claim. App. 108a. This arbitration clause was so lopsided that Petitioner attempted to retract this language "in an eleventh hour change" in the middle of the hearing to determine whether Petitioner's arbitration clause was enforceable. App. 47a.

Petitioner has not produced a copy of its arbitration clause. The record that does exist before this Court makes it clear that Petitioner's arbitration clause was not a modern-era arbitration clause

offered in an effort to make arbitration look like an attractive idea. Petitioner's arbitration clause is from an older era when merchants imposed "arbitration clauses" that were never expected to be used by consumers. These sorts of provisions, and this includes Petitioner's provisions, function as *anti*-arbitration clauses. They have historically been used like big sticks to beat consumers into submission if ever any of them figure out that they are being ripped off. Petitioner's arbitration clause, based upon the clear wording of the provision, functions as one of these prototypical old-era anti-arbitration clauses. It is a wolf in sheep's clothing; it looks like an attractive option but it functions as a lock-tight exculpatory clause. Never has this Court indicated that it is in the business of enforcing arbitration clauses that function to deny consumers their basic rights. That day should never come.

The trial court considered substantial amounts of real-world evidence in order to answer the questions before it and the Missouri Supreme Court reviewed the same evidence in coming to its own conclusion. The choices for the Missouri Supreme Court were limited. It needed to give the claimants their day in court, but it also needed to abide by the FAA, subject to general state law contract defenses. Based on its careful analysis, the Missouri Supreme Court found a way to accommodate each of these objectives. That solution required striking the arbitration clause entirely, which was also done in accordance with Petitioner's own severability clause and in accordance

with arbitration-neutral general state contract law. *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 108-09 (Mo. App. E.D. 2003). The alternative – forcing Respondent's case into individual arbitration – would have denied meaningful access to Respondent and other class members.

If the Petitioner had its way, how would any of the alleged victims get a day in court or in arbitration? Perhaps Petitioner believes that an army of experienced consumer attorneys will somehow show up out of nowhere, each of them offering to handle complex predatory lending cases for a few hundred dollars each, despite the fact that each of these individual cases would involve considerable hours of lawyering, plus the significant costs of depositions, experts, appeals, court costs, and arbitration fees.

Petitioner has nothing significant to say about Respondent's second and independent objection that Petitioner's arbitration clause functioned as an improper exculpatory provision (Petitioner dedicates about 10 words to the topic at p. 24 of the Petition). Respondent is silent even though the Missouri Supreme Court highlighted this second independent defense and indicated that this second state law defense plainly and independently applied in this case.

At page 5, Petitioner complains that it must now "defend a class action in court, as if the arbitration agreement never even existed." The truth is that Petitioner will now need to defend this case in court as if its *unconscionable* and *exculpatory* arbitration

clause never existed. Petitioner had the opportunity to draft a clause that wouldn't exonerate itself from systematic wrongdoing, but it didn't take that path. In light of its free choice to take the road to unbridled strong-arming of consumers, it is not in any position to complain. To the extent that Petitioner ever decides to write an *enforceable* arbitration clause in the future, the FAA and the Missouri Supreme Court will not serve as obstacles to arbitration.

The Missouri Supreme Court resolved the present matter based upon law that applies to all contracts, namely law relating to unconscionability and exculpatory clauses. It concluded that Missouri Title Loan's contract was unconscionable and that it also served as an exculpatory clause that, due to its ambiguity, was unenforceable under Missouri contract law. Petitioner contends that the holding is preempted, pursuant to the Federal Arbitration Act, arguing that the Missouri Supreme Court created a special test for arbitration clauses. This argument suggests that the Missouri Supreme Court's majority opinion is insincere and/or that the Missouri Supreme Court was confused as to what Missouri law is. To the contrary, the *Brewer* majority expressly states it is following general Missouri contract law and that it is fully aware of its obligation to treat arbitration clauses as it would any other contract.

As a result, Petitioner's request for a decision from this Court is a request to have this Court decide what does and does not constitute general Missouri

contract law. This is not the sort of work in which this Court engages.

CONCLUSION

For the above-stated reasons, Respondent respectfully asks this Court to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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